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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRONE HAWTHORNE,

Defendant and Appellant.

B292746

(Los Angeles County
Super. Ct. No. BA463710)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Bork, Judge. Conditionally reversed and remanded with directions.

Robert F. Somers, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Tyrone Hawthorne of sale of a controlled substance, and misdemeanor possession of a controlled substance for sale. He was sentenced to five years in prison. On appeal, Hawthorne argues the case should be remanded to allow the trial court to consider (1) whether to grant pretrial diversion for mental health treatment under recently enacted Penal Code section 1001.36,¹ and (2) whether he has the ability to pay the court fines and fees imposed. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).) We conditionally reverse the judgment and remand the case.

FACTUAL AND PROCEDURAL BACKGROUND

On November 20, 2017, a police detective observed Hawthorne selling a white crystalline substance on the street. Officers arrested Hawthorne shortly thereafter—they found him holding a crystal methamphetamine pipe and a lighter. Hawthorne had .31 grams of crystal methamphetamine on him and \$20, the street value for the amount of drugs he had sold. Hawthorne was charged with sale of a controlled substance (Health & Saf. Code, § 11379, subd. (a)) and possession of a controlled substance (Health & Saf. Code, § 11378). The information also alleged that that he had served five prior prison terms (§ 667.5, subd. (b)), and had three prior “strike” convictions (§§ 667, subds. (b)–(j), 1170.12). He pled not guilty and denied the special allegations.

A jury found Hawthorne guilty of selling drugs, and of the lesser included offense of misdemeanor drug possession (Health & Saf. Code, § 11377, subd. (a)). The trial court found true all prior convictions and prison term allegations.

¹ All further statutory references are to the Penal Code unless otherwise stated.

Hawthorne was sentenced to five years in state prison: the low term of two years on the first count doubled to four years under the Three Strikes law, plus one year for one prior prison term, and a concurrent six months on the misdemeanor count. The court struck the remaining prior conviction allegations for the purposes of sentencing. The court also imposed a \$300 restitution fine (§ 1202.4, subd. (b)), a \$80 court security fee (§ 1465.8, subd. (a)(1)), and a \$60 criminal conviction facilities assessment (Gov. Code, § 70373, subd. (a)(1)). Hawthorne timely appealed.

DISCUSSION

Hawthorne argues that he is entitled to a pretrial hearing on diversion under recently enacted section 1001.36 because the Legislature intended the statute to apply to cases pending on appeal.² As Hawthorne points out, the record shows that he had two psychiatric hospitalizations in 2015 and 2016. He argues that the trial court should have the opportunity to determine whether those hospitalizations suggest that continuing mental

² Appointed counsel for Hawthorne initially asked this court to review the record to determine whether there were any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) We directed the parties to file briefs discussing whether Hawthorne is entitled to a conditional remand to allow the trial court to consider whether to refer him to mental health diversion. The parties did so.

Hawthorne's counsel also submitted a supplemental brief arguing that the case should be remanded to allow the trial court to determine whether Hawthorne has the ability to pay the fines and fees imposed. (*Dueñas, supra*, 30 Cal.App.5th 1157.) □ Respondent opposed this relief in its brief. As we conditionally reverse for a mental health diversion proceeding, the trial court will have the opportunity to consider the issue on remand.

illness was a “significant factor in the commission of the charged offense[s].” (§ 1001.36, subd. (b)(1)(B).)

Respondent counters that the language of subdivision (c) of section 1001.36 demonstrates that the Legislature intended the enactment to operate prospectively only, i.e., the enactment does not apply to cases such as this one in which there has already been a trial court adjudication.

Recently in *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), the Court of Appeal held that section 1001.36 applies retroactively. Our Supreme Court granted review of *Frahs*, and will have the final say on the matter. (*People v. Frahs* (Dec. 27, 2018, S252220).)³ For now, we agree with *Frahs* that section 1001.36 applies retroactively.

Respondent also argues that because Hawthorne has a prior strike, he is ineligible for diversion. We first observe that the existence of a prior strike is not a disqualifying factor under section 1001.36, subdivision (b)(2) which lists a series of automatically disqualifying offenses—no inquiry into current danger is required. Neither in subdivision (b)(2) nor anywhere else in section 1001.36 does the Legislature mention prior strikes.

In apparent recognition that “prior strike” is nowhere to be found in the statute, respondent makes a more nuanced argument: Hawthorne’s prior strike necessarily means he poses an unreasonable risk of danger to public safety. Thus, he is

³ California Rules of Court, rule 8.1115(e)(1) [“Pending review and filing of the Supreme Court’s opinion, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only”].

disqualified from mental health diversion under section 1001.36, subdivision (b)(1)(F).

Subdivision (b)(1)(F) prohibits the court from placing a defendant in diversion unless the “court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in [s]ection 1170.18, if treated in the community.” Subdivision (b)(1)(F) expressly allows the court to “consider the defendant’s violence and criminal history, the current charged offense, and any other factors that the court deems appropriate.” Section 1170.18, in turn, sets forth several criteria the court may consider in determining whether a defendant poses an unreasonable risk such as the defendant’s “criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes.” (§ 1170.18, subd. (b)(1).)

From this nonexclusive list, we conclude that the determination of unreasonable risk under 1001.36, subdivision (b)(1)(F) is discretionary, and does not allow for a mechanical finding of danger based only on the fact that the defendant suffered a prior strike. On remand, the trial court shall exercise its discretion in determining whether Hawthorne’s prior strikes or any other appropriate factors indicate that he would pose an unreasonable risk of danger to public safety if treated in the community.

Respondent also argues that Hawthorne is ineligible for diversion because the Penal Code prohibits the court from suspending the sentence of a defendant with a prior strike. (§§ 667, subd. (c)(2), 1203, subd. (k).) Here, our disposition

conditionally reverses the judgment; it does not suspend a sentence.

Hawthorne's case is not yet final on appeal and the record affirmatively discloses that he appears to meet at least one of the threshold requirements. As in *Frahs*, we will remand to allow the trial court to determine whether Hawthorne should be referred for mental health diversion under section 1001.36. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.)

Hawthorne also argues that the trial court's failure to determine whether he had the ability to pay court fines and fees prior to their imposition violated his constitutional rights to due process and equal protection under *Dueñas*, *supra*, 30 Cal.App.5th at p. 1157. Because we are remanding the case for consideration of Hawthorne's eligibility under section 1001.36, Hawthorne will have the opportunity to raise this argument before the trial court. If mental health diversion is not an appropriate or viable option for Hawthorne and the trial court reinstates the judgment, the trial court shall in connection with those proceedings consider Hawthorne's ability to pay fines and fees under *Dueñas*, *supra*, 30 Cal.App.5th at p. 1157.

DISPOSITION

The judgment is conditionally reversed and the matter is remanded to the trial court with directions to conduct a diversion eligibility hearing under section 1001.36 within 90 days from the remittitur. If the trial court determines that Hawthorne is not eligible for diversion, then the court shall reinstate the judgment.

If the trial court determines that Hawthorne is eligible for diversion but, in exercising its discretion, the court determines diversion is not appropriate under the circumstances, then the court shall reinstate the judgment.

If the trial court determines that Hawthorne is eligible for diversion and, in exercising its discretion, the court further determines diversion is appropriate under the circumstances, then the court may grant diversion. If Hawthorne successfully completes diversion, the court shall dismiss the charges in accordance with section 1001.36, subdivision (e). If Hawthorne does not successfully complete diversion, the trial court shall reinstate the judgment.

If the trial court reinstates the judgment under any of these situations, it shall in advance consider any argument raised by Hawthorne about his ability to pay court fines and fees.

RUBIN, P. J.

WE CONCUR:

MOOR, J.

KIM, J.